

Liberalism and the Constitutional Canon: The 1960s and Its Aftermath

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*“The intractable economic, social, and even philosophical problems
presented by public welfare assistance programs
are not the business of this Court.”*

Supreme Court of the United States,
Dandridge v. Williams, 397 U.S. 488 (1970).

The U.S. Court decisions on the Equal Protection Clause after *Brown v. Board of Education*, 347 U.S. 483 (1954) that did not figure so prominently in the historiography of civil rights but which may have still become canon proper to law may serve us well in the search for global constitutional canon. The U.S. Supreme Court’s ruling in 1970 in a prominent case serves as the main focus of my paper. I will briefly describe the decision and its context, and then present the opposing arguments and how these are reflected in the decision. Finally, the underlying approaches in the above arguments will be discussed, in light of their philosophical background assumptions where I restate the case, as clearly establishing a legal schema¹ significant for comparative law.

¹ William H. Sewell. “A Theory of Structure: Duality, Agency, and Transformation”. 98 *American Journal of Sociology* 1 (1992).

Summary of the Case and Opinion

In *Dandridge v. Williams*², Williams was one of two large Baltimore families in this case on the Social Security Act³ and U.S. Constitutional Equal Protection Clause⁴. An earlier District Court decision had validated a claim to equal Aid to Families With Dependent Children (AFDC) benefits for children against the State's taking away, by use of a contested state regulation, benefits to the seventh child or additional later children. In *Dandridge v. Williams*, the Supreme Court reviewed this District Court decision. _While these benefits ultimately were retained for the later children in those families, it was not due to the Court recognizing any absolute right in the economic and social field, as the quote beginning this paper relating to public welfare assistance programs explicitly states. These mere pecuniary benefits, curtailed by the State regulation, would only be restored later by the State of Maryland when the regulation was changed. _The Supreme Court's tepid reception of the arguments for these rights stands in stark relief next to the Court's recognition of the large family's inherent "greater ability ... to accommodate their needs to diminished [benefits] due to economies of scale"⁵_under a maximum benefit

² Supreme Court of the United States. *Dandridge v. Williams*, 397 U.S. 471 (1970).

³ United States, Social Security Act of 1935, Title IV (42 U.S.C.A. § 301 et seq): Grants to States for Aid to Dependent Children Appropriation.

⁴ United States. Equal Protection Clause: Article XIV (the Fourteenth Amendment): The Equal Protection Clause, ratified on July 9, 1868.

⁵ Supreme Court of the United States. *Dandridge v. Williams*, 397 U. S. 480 (1970). *Supreme Court Reporter*, West Publishing Company, 90 S. Ct. 1153 (1970), at 1159.

provision. Ironically, the State only voluntarily changed the regulation to grant equal benefits to the seventh child.

The Supreme Court in the above-quoted decision wrote that it recognized the “conflicting claims of morality and intelligence of almost every measure, certainly including the one before us.”⁶ —There is no shortage of ideas for social welfare programs; the literature being rife with examples just cited in *Dandridge v. Williams*⁷, from the specialized fields of sociology or other human sciences; nor dearth of these “conflicting claims of morality” from the field of moral philosophy.

The progressive agenda addressed the difficult economic and social problems for which the Court declined to prescribe solutions. —When it came to deciding upon the allocation of resources by a restricting state within society, the Court limited its decision to how far equality extended in the provision of welfare benefits, as we will see later. —In so deciding, the Court’s implication was that if the individual or family could save for its needs, the larger family was peculiarly capable of this. —

⁶ Supreme Court of the United States. — *Dandridge v. Williams*, 397 U. S. 488 (1970). — *Supreme Court Reporter*, West Publishing Company, 90 S. Ct. 1153 (1970), at 1162.

⁷Supreme Court of the United States. *Dandridge v. Williams*. For example, see several studies from: Brief for Appellees, Index, pp. ix-x; or Reply Brief for the Appellants, Table of Citations, pp. iii-iv; especially Comment, Compulsory Work for Welfare Recipients Under the Social Security Amendments of 1967, 4 Colum. J.L. & Soc. Prob. 197 (1968); and Rein, *Choice and Change in the American Welfare System*, 1969, *The Annals of the American Academy of Political and Social Science*, 89, 109.

These rough guidelines were not inconsistent with justice theory, for example Rawls' theory of justice,⁸ which uses the family (rather than the individual) as the basic unit that matters. To that degree only could the decision be squared with the liberal argument made by the advocates for social change in the Court.

1. The Case for Social Change

Where the State of Maryland contested the invalidation of a grant maximum in the state AFDC regulation, the authors of the argument for social change in the case responded, holding to a liberal political theory and a broad^{9,10} philosophy, that Rawls developed in *Theory of Justice* into fundamental principles of justice¹¹ identified in one writer's critique as the "principles that specially designed choosers would adopt for the sake of regulating society"¹². The attorneys argued that the later children in large

⁸ John Bordley Rawls. *Theory of Justice*. The Belknap Press of Harvard University Press, (1971).

⁹ Bill E. Lawson. In a review of *The Limits of Rawlsian Justice* by Roberto Alejandro, Professor Lawson says that the author, in analyzing Rawls, finds that the origins of the Rawlsian project to have "at its base" the views of both Hobbes and Kant. *Choice: Current Reviews for Academic Libraries, Online*, Association of College & Research Libraries, ALA (American Library Association), October 1998.

¹⁰ Roberto Alejandro. *The Limits of Rawlsian Justice*. John Hopkins University Press, 1998.

¹¹ John B. Rawls, *Theory of Justice*, p. 53. In the further elaborated original position in Rawls' contractualist theory, the members of the system idealized in the theory, without prejudging the choices they make for principles, represent "the sort of persons that men want to be," p. 230.

¹² Gerald A. Cohen. "Facts and Principles", a paper presented in the Workshop in Law, Philosophy, and Political Theory at the University of California at Berkeley School of Law, March 13, 2003; p. 42.

families were entitled to the same benefits as the rest of those needy children.¹³

The Legal Aid attorneys in their brief wrote that the provision of benefits under AFDC to all children in need, along with the Equal Protection Clause, in the statutory¹⁴ and Constitutional¹⁵ law, respectively, required giving individuals (roughly) equal benefits. The briefs for the Appellees philosophized that entitlement to such equality of benefits constituted an equal right to life.

The recourse of such authors to philosophical arguments of this kind while not as common today has a long history, seen in the older writing of legal scholars. Perhaps because of the discrepancy between the theory and practice of justice, this underpinning of abstract philosophical argument is absent in much current practice of law.¹⁶

The result of this argument mixing Rawlsian and other elements of philosophy with the volatile urban politics of the inner city did not apparently sway the Court in the latter's decision and so seemed to lack immediate significance. The case's historical importance could be located in the kind of argument of the parties involved in debating the state regulation, which would be played out in certain less prominently-situated

¹³ Supreme Court of the United States. *Dandridge v. Williams*, 397 U. S. 476, 477 (1970). *Supreme Court Reporter*, West Publishing Company, 90 S. Ct. 1153 (1970), at 1156 and 1157.

¹⁴ Social Security Act.

¹⁵ Article XIV.

¹⁶ Mark A. Graber, "Constitutional Politics and Constitutional Theory: A Misunderstood and Neglected Relationship." (Book review on *The Warren Court and American Politics* by Lucas A. Powe, Jr., Harvard University Press, 2000.) 27 *Law and Social Inquiry* 309 Spring 2002 © American Bar Foundation.

discursive effects. These effects are constituted by the sedimentation¹⁷ of everyday relations with respect to legality,¹⁸ the latter as epitomized by the decisions of the Court.

_____That conceivably the “right to life”¹⁹ could be selectively provided based upon the child’s relative position in the family order, was a problem.

For the time being, however, there was merely a reverberation in the Court’s decision of the Appellees’ argument, without agreeing with them on the state measure as to the question of legality. The respondents (Appellees) argue: “When a legislative classification has the effect of placing such additional burdens on a class of persons characterized by its extreme poverty and a practical inability to escape from problems which the classification creates, strict scrutiny of the classification is appropriate”.²⁰ The Court acknowledged, in citing “intractable... problems”²¹, the difficulty with, without necessarily agreeing with the inescapability of, problems related to public welfare, including philosophical ones.

¹⁷ Michael W. McCann, “Reform Litigation on Trial”, 17 Law & Social Inquiry 715 (1992).

¹⁸ Robert A. Kagan; Martin Krygier; and Kenneth Winston, eds. *Legality and Community: On the Intellectual Legacy of Philip Selznick*. Bowman & Littlefield Publishers, Inc.; and the Berkeley Public Policy Press, Institute of Governmental Studies, University of California at Berkeley, 2002.

¹⁹ Supreme Court of the United States. *Dandridge v. Williams*, 397 U. S. 488 (1970). *Supreme Court Reporter*, West Publishing Company, 90 S. Ct. 1153 (1970), at 1163.

²⁰ Supreme Court of the United States. *Dandridge v. Williams*, Brief For The Appellees. October Term, 1969, No. 131; Argument I.C.2.b. concerning the Right to Life, p. 44.

²¹ Supreme Court of the United States. *Dandridge v. Williams*, 397 U. S. 488 (1970). *Supreme Court Reporter*, West Publishing Company, 90 S. Ct. 1153 (1970), at 1163.

2. The Opposing Case

A quote from the famous dissent of Justice Field and Justice Strong:

By the term ‘life’, as here used, something more is meant than mere animal existence. The inhibition against its deprivation extends to all those limbs and facilities by which life is enjoyed. *** The deprivation not only of life, but of whatever God has given to everyone with life, for its growth and enjoyment, is prohibited by the provision in question, if its efficacy be not frittered away by judicial decision.²²

was cited by Appellees in their response to the State’s initial argument. A common sense or natural law argument here was applied to a strictly pecuniary issue about a public regulation.

The State, in opposing, would repeat the allusion to Justice Field’s dissent with irony in its successful effort to defend the regulation:

“The irony inherent in the use of Justice Field’s words is, of course, self-evident... The present case in itself is of limited practical importance... The doctrinal significance of the case is, however, greater.”²³

As for the other key issue of the argument, the Appellants “do not accept the suggestion that the validity of the Maryland regulation under the Social Security Act can be deemed to turn on the question whether the Maryland regulation “treat(s) the family as the proper unit

²² Supreme Court of the United States. Munn v. Illinois, 94 U.S. 113, 142 (1876). Quoted in Supreme Court of the United States. Dandridge v. Williams, Brief For The Appellees. October Term, 1969, No. 131; Argument concerning the Right to Life, p. 42.

²³ Supreme Court of the United States. Dandridge v. Williams, Reply Brief For The Appellants. October Term, 1969, No. 131; Conclusion, on p. 20.

of assistance... it is an approach fully consistent with federal law, which has traditionally, with some exceptions, adhered to the ‘cash benefit’ principle requiring benefits for a family to be paid in a lump sum to the family head”.²⁴ If it had looked like that for official purposes of the State, in calculating benefits, the seventh “extra child,” was not a person, this would be a strong argument for change, but any reliance upon a natural law argument was undermined by more than one reference to “mathematical nicety,”²⁵ as perhaps the State caricatured the ideal of equality being advanced by the advocates, at the Bar, of social change.

3. Resolution of the Opposing Sides

If the implication was that the seventh child was not a person (for the purpose of the Maryland statute), the Court’s majority hinted at the possibility that he was, by including a few humanizing details²⁶, repeated from what was referred to by Appellants, from Appellee’s ‘Statement’ “elaborately recite[d] ... facts relating to the individual situations of the exceptionally circumstanced named plaintiffs.”²⁷ Alluding to the larger families’ “greater ability to accommodate their needs to diminished

²⁴ Supreme Court of the United States. Dandridge v. Williams, Reply Brief For The Appellants. October Term, 1969, No. 131; Introduction to Argument, p. 2.

²⁵ Supreme Court of the United States. Dandridge v. Williams, 397 U.S. 485 (1970); as cited from Supreme Court of the United States, Stuart Lindsley v. Natural Carbonic Gas Co., 220 U.S.61, 78; 31 S.Ct 337, 340; 55 L.Ed.369.

²⁶ Supreme Court of the United States. Dandridge v. Williams, 397 U.S. 475, 476 (1970). Supreme Court Reporter, West Publishing Company, 90 S. Ct. 1153 (1970), at 1156.

²⁷ Supreme Court of the United States; Dandridge v. Williams, Reply Brief For The Appellants. October Term, 1969, No. 131; Introduction to Argument, p. 1.

benefits”²⁸, the Court seemed to invoke a theme of the 1960s. By this reliance upon poor people’s innate resourcefulness, the Court was able to avoid either resolving the conflicting claims of morality of such measures or focusing on design of institutions as a way to address social and economic problems, as its decision quoted at the beginning of this chapter explicitly states.

While upholding such maximums where the youngest members of large families were given no extra allowance, the Court did not explicitly refer to the family as the proper unit of assistance, and indeed detailed a set of complex calculations by which it could be understood the proper unit of assistance was a more nuanced version. If heads of families were the recipients of these grants, then a “rough accommodation” existed so far as children in these families were concerned. Equality would mean at least here, fundamentally, the equal protection of that liberty within which the accommodating of the family’s needs is made possible, along the lines of Rawls’ first principle of justice, which states, “Each person is to have an equal right to the most extensive scheme of equal basic liberties compatible with a similar scheme of liberties for others.”²⁹ This principle takes precedence in the designing of social institutions.

²⁸ *Ibid.*

²⁹ John B. Rawls. *Theory of Justice*. Belknap Press of Harvard University Press (1971), p.53.

The grant maximums imposed by the state, in the part of the decision addressing economic “gratuitous”³⁰ benefits, which was decried by progressives, would not be subject to the same “strict scrutiny” as fundamental civil rights, according to the Court’s ruling. _A state can choose regulation based on welfare economics but without strict “mathematical nicety.”³¹ _The Appellants successfully argued against perceiving the system of economic benefits as “a closed system,”³² even though such a system might lend itself to a logical treatment where an individual’s share could be measured precisely. _As for the philosophical problem, raised by the theory of equal right to life, the Court evinced the approach of communality as it addressed the family, an approach bolstered by philosophy from natural law.

Our main example here poses the “philosophical problem,” in the quotation at least recognized by the Court. _While disavowed as a concern of the Court, perhaps such a problem can be rooted in its philosophical foundations. _Then, some insight can be gained into its historical development in Western law by studying the philosophical problem

³⁰ Supreme Court of the United States. _*Dandridge v. Williams*, 397 U.S. 522, (1970). _*Supreme Court Reporter*, West Publishing Company, 90 S. Ct. 1153 (1970), at 1161.

³¹ Supreme Court of the United States. _*Dandridge v. Williams*, 397 U.S. 486, (1970). _*Supreme Court Reporter*, West Publishing Company, 90 S. Ct. 1153 (1970), at 1180.

³² Supreme Court of the United States. _*Dandridge v. Williams*, Reply Brief For The Appellants. October Term, 1969, No. 131; Conclusion, on p. 22.

diachronically: the same philosophical problem that may not have been a concern at that early time of the Court is now a concern.

In the case example, alluding to the larger families’ “greater ability to accommodate their needs to diminished benefits,”³³ the Court denies an equal right to benefits while invoking communality. By this reliance upon poor people’s innate resourcefulness, the Court was able to defer resolving “the conflicting claims of morality” inherent in the inequality of such measures in judging the legality of institutions’ way of addressing social and economic problems. This communality would demonstrate a set of philosophical background assumptions, (we contrast this philosophy with two other philosophical approaches³⁴, in which the law functions as a mechanism to regulate the social and economic order, or to mediate between individuals as in contractarianism), which was applied to the family, the smallest unit of social organization, and would also reverberate in the Court’s treatment of the class of welfare recipients as a whole, as the Court stated³⁵:

We see nothing in the federal statute that forbids a State to balance the stresses that uniform insufficiency of payments would impose on all families against the greater ability of large families—because of the inherent economies of scale—to accommodate their needs to diminished per capita payments. The strong policy of the statute in favor of preserving family units

³³ Supreme Court of the United States. *Dandridge v. Williams*, 397 U. S. 480 (1970). *Supreme Court Reporter*, West Publishing Company, 90 S. Ct. 1153 (1970), at 1159.

³⁴ Peter J. Steinberger. *Ideology and the Urban Crisis*. SUNY Press, Albany, New York (1985).

³⁵ Supreme Court of the United States. *Dandridge v. Williams*, 397 U. S. 476, 477 (1970). *Supreme Court Reporter*, West Publishing Company, 90 S. Ct. 1153 (1970), at 1156 and 1157.

does not prevent a State from sustaining as many families as it can, and providing the largest families somewhat less than their ascertained per capita standard of need...

The plaintiffs in this case inhabited twentieth-century urban America during the social conflagration of the 1960s. The underlying philosophy of communality, seemed resonant with the Sixties. But this approach has been a theme of earlier history as well, for example, in the British attitude of salutary neglect toward distant colonial subjects.

The 1970 decision's directly appealing to the resources of the community for accommodating unmet needs was no new practice. Throughout this era frequent reliance on this schema occurred, most notably in programs such as those under the Office of Economic Opportunity,³⁶ harnessing community resources and receiving their inspiration from the civic philosophy that emphasized relying on networks native to the social group of concern. Grassroots in style, and based on individual initiative, these programs would inspire such optimistic readings of the social destiny as *The Greening of America*³⁷ and are thus in part representative of the intellectual forbearers of such movements today.

But in any case, the Court that handed down the 1970's Williams decision, through the invoking of the philosophy of integral community, could be said to be establishing a canonically grounded baseline for what

³⁶ Steinberger, *ibid.*

³⁷ Charles A. Reich, *The Greening of America*. Excerpts first published in an essay under the same title in *The New Yorker* (September 26, 1970) and then published in its entirety in book form by Random House, NY, 1970.

the community³⁸ could claim to solve for itself: residual issues after governmental and courthouse measures had tried their best and failed. The Courts thus allows such a legal schema as would be exemplified by the original situation of young Mr. Williams in the eponymous case which grounds I bring out as the concern now before the Court in this paper.

Restatement of Facts and Case

In the original briefings here it was argued that, the seventh child deserved the same benefits as the other children, in *Dandridge v. Williams* 397 U.S. 471 (1970). The Court accepted the state's rationale, as not morally repugnant, under the rubric of "greater economies of scale" as mitigating inequality. Thereby, that position of Mr. Williams now as a child now as a grown adult with his own children though deprived of assistance provided to others without his "unlucrative" but otherwise identical position and thus relegated to a certain unequal position, would not constitute a grave threat to life (those fundamental notions) enunciated by the Court were characterized by Mr. Williams and protected under the Fourteenth Amendment.

The philosophical problem, while not hypostatized by the attorneys as a way to violate such fundamental notions as freedom of speech and

³⁸ John B. Braithwaite. "A Future Where Punishment Is Marginalized: Realistic or Utopian?" *UCLA [University of California at Los Angeles] Law Review*; Volume 46, Number 6, August 1999.

association, originated in its precise formulation though obviously not foreseen by, them as preceding some such eventuality. If this is so, the Court may not have been complicit in the violation, and the attorneys in establishing inequality in social groups for future role in abridging liberty within and thereby abusing the trust previously existing therein. The Court could be said to be affirmatively establishing the moral datum upon which, in any future adjudication, relations therein would be expected to turn. That expectation was one of accommodation for the “greater abilities”, in the Court’s decision noting officially the philosophical problem. Those characterized by those problems which a classification, through, e.g., the increasing reification of “some inequality” *Dandridge v. Williams*, 397 U.S. 486 (1970) under that schema should constitute the class for which protections such as under the strict standard of scrutiny applies.

Further Statement of the Case and Conclusion

If the state, by categories promulgated by the state, productive of some inequality, has indeed used this inequality in conduct which trespasses the relations of trust which such an “economy of scale” assumes, and categorically affronts by fundamental rights violations Mr. Williams and those like him relegated to this subclass, the recourse would be to the fundamental notion of the human rights schema latent within the Court decision. In court proceedings at the state and federal level,

Williams has laid out the philosophical problem as an inescapable contradiction for the liberty of those who were subject of and characterized by said problem, and then subjected to that steadfast affront under color of law.

Without recourse to fundamental notions of constitutionalism no measures could be taken to ameliorate this affront upon the family, nor could the system of ill-treatment of the rights of himself or his family including the children be any way changed at the present time without returning to the constitutional schema putatively laid out in that decision. Therefore in propounding this schema as constitutional canon we would be benefiting Fourteenth Amendment jurisprudence where there are current unresolved problems and grounds for concern.